Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-82–12 OF 2013(W)
RAUS SHARIF PCA, ZALEHA ZAHARI, ZAINUN ALI, JEFFREY TAN AND RAMLY ALI FCJJ
11 NOVEMBER 2014

Contract — Assignment — Assignment of sum due — Contracts for sale and purchase of goods required seller to obtain buyer's prior written consent if it wanted to assign any part of contracts to third party — Seller and third party signed deed of assignment absolutely assigning to third party all of seller's rights title and interests in contracts — Buyer not party to and did not consent to deed of assignment — Whether buyer not obliged to honour terms of deed — Whether deed of assignment was not enforceable against buyer

The respondent ('DBP') contracted to buy goods from a company ('Benatulin') for the years 1996 and 1997. To enable it to carry out the contract, Benatulin took a financing facility from the appellant ('Merita') and, as security, assigned to Merita all payments Benatulin would receive from DBP for the goods supplied. The contracts between DBP and Benatulin expressly provided that Benatulin could not, inter alia, assign any monies due to it under the contracts to a third party without getting DBP's prior consent. DBP consented to Benatulin's request to assign to Merita the payments that were due to it under the 1996 contract and DBP accordingly remitted the payments direct to Merita. However, when the 1997 contract came into force, Benatulin obtained DBP's consent to have the payments sent to another entity ('CFP') instead. Merita subsequently sued both Benatulin and DBP for non-receipt of monies under the 1997 contract and accused both the parties of not honouring the assignment. Merita contended that the documentary evidence showed that the 1997 contract was an extension of the 1996 contract on the same terms; and that the invoices issued to DBP clearly contained endorsements that payments were to be made directly to Merita. Merita also relied upon an undated deed of assignment ('P2') signed between Benatulin and Merita and stamped in April 1998 that purportedly absolutely assigned to Merita all of Benatulin's rights, title and interest under its contracts with DBP. In its defence, DBP maintained that it was not bound by P2. It was not a party to P2 and had never consented to it. The High Court allowed Merita's claim against DBP holding that the 1997 contract was an extension of the 1996 contract and that P2 was an absolute assignment that bound DBP. The Court of Appeal ('COA') allowed DBP's appeal, set aside the trial court's decision and held that the trial judge was wrong to rule that DBP was bound by P2 when it was never a party

to it and was never served with that document. The Federal Court granted Merita leave to appeal against the COA's decision on the question whether the consent of the debtor was a legal requirement under s 4(3) of the Civil Law Act 1956 for an absolute assignment to be valid in law. At the instant appeal hearing, Merita submitted that since s 4(3) did not require the debtor's consent to make an assignment valid, the non-assignment clauses in the 1996 and 1997 contracts contravened s 4(3). DBP argued that so long as Benatulin did not obtain its consent to make an assignment under the contracts it had no obligation to honour any such assignment and the assignment was not enforceable against DBP.

Held, dismissing the appeal:

(1) Although the consent of the debtor was not a precondition under s 4(3) of the Civil Law Act 1956 ('CLA'), the pivotal issue here was whether one party to a contract could unilaterally assign his rights and benefits under the contract despite agreeing to be bound by a non-assignment clause which clearly stipulated that consent was a precondition before a valid assignment could be effected. This brought into focus another issue, ie, whether consent under a non-assignment clause was a precondition before an assignment could be valid notwithstanding the fact that this was not clearly spelt out under s 4(3) of the CLA; or, whether the non-assignment clause and the requirement for consent were valid in law (see paras 21–22).

(2) On the facts of the case, the Court could not accede to Merita's argument that since a proper notice of assignment in writing was given to DBP, the requirement for a valid and binding assignment to take effect under s 4(3) of the CLA was fulfilled. Under the 1996 and 1997 contracts, consent was a pre-requisite before a valid assignment could be made. The requirements under s 4(3) of the CLA with regard to a legal assignment only came into play if the contract was assignable or the restriction to assign was fulfilled. In the instant case, the non-assignment clauses and the element of consent formed an important term of the contracts that the parties had agreed to. That formed the main pre-requisite before the other pre-requisites under s 4(3) of the CLA could be considered (see para 32).

(3) The point of critical importance was not whether notice of the assignment was given to DBP but whether Benatulin had obtained DBP's consent before executing the assignment with Merita. Since Benatulin failed to secure DBP's consent, DBP was not bound to honour Merita's request and rightly refused to recognise Benatulin's instruction to make payment to Merita. The purported assignment, P2, which lacked DBP's consent to it, was not binding upon DBP and was unenforceable against it. P2, without DBP's consent to it, was a clear breach of cl 23 of

A the 1997 contract. Merita's claim as an assignee therefore failed. Furthermore, Merita's claim against DBP could not be allowed as DBP had already made payments for the 1997 contract to both CFP and Benatulin. Thus, it was unjust for Merita to initiate proceedings against DBP for payments that had already been made (see paras 43–44).

B

[Bahasa Malaysia summary

Responden ('DBP') memasuki kontrak untuk membeli barangan daripada syarikat ('Benatulin') untuk tahun 1996 dan 1997. Untuk membolehkannya melaksanakan kontrak tersebut, Benatulin mengambil kemudahan kewangan
C daripada perayu ('Merita') dan, sebagai jaminan, menyerahhakkan kepada Merita kesemua bayaran yang Benatulin akan dapat daripada DBP untuk barangan yang dibekalkan. Kontrak di antara DBP dan Benatulin secara nyata memperuntukkan bahawa Benatulin tidak dapat, antara lain, menyerahhakkan apa-apa wang yang kena dibayar kepadanya di bawah
D kontrak kepada pihak ketiga tanpa mendapatkan izin terdahulu daripada DBP. DBP bersetuju kepada permintaan Benatulin untuk menyerahhakkan kepada Merita bayaran-bayaran yang kena dibayar kepadanya di bawah kontrak 1996 dan DBP dengan itu meremit balik bayaran-bayaran tersebut langsung kepada Merita. Walau bagaimanapun, apabila kontrak 1997 berkuatkuasa, Benatulin
E mendapatkan izin DBP untuk bayaran-bayaran tersebut sebaliknya dihantar kepada entiti lain ('CFP'). Merita kemudiannya menyaman kedua-dua Benatulin dan DBP untuk wang yang tidak diterima di bawah kontrak 1997 dan menunduh kedua-dua pihak tidak menghormati penyerahhakkan. Merita berhujah bahawa keterangan dokumentar menunjukkan bahawa kontrak
F 1997 adalah lanjutan kontrak 1996 atas terma yang sama; dan invois-invois yang dikeluarkan kepada DBP jelas mengandungi pengendorsan bahawa bayaran-bayaran adalah untuk dibuat secara langsung kepada Merita. Merita juga bergantung ke atas surat ikatan penyerahhakkan yang tak bertarikh ('P2') ditandatangani di antara Benatulin dan Merita dan disetem pada April 1998
G yang dikatakan diserahhakkan secara mutlak kepada Merita kesemua hak, hakmilik dan faedah Benatulin di bawah kontraknya dengan DBP. DBP dalam pembelaannya mengekalkan bahawa ia tidak terikat oleh P2. Ia bukan pihak kepada P2 dan tidak pernah bersetuju kepadanya. Mahkamah Tinggi membenarkan tuntutan Merita terhadap DBP dengan memutuskan bahawa
H kontrak 1997 adalah lanjutan kontrak 1996 dan bahawa P2 adalah penyerahhakkan mutlak yang mengikat DBP. Mahkamah Rayuan ('MR') membenarkan rayuan DBP, mengetepikan keputusan mahkamah perbicaraan dan memutuskan bahawa hakim perbicaraan adalah salah untuk memerintahkan bahawa DBP adalah terikat oleh P2 apabila ia tidak pernah
I menjadi pihak kepadanya dan tidak pernah diserahkan dengan dokumen tersebut. Mahkamah Persekutuan membenarkan izin kepada Merita untuk merayu terhadap keputusan MR tersebut atas soalan sama ada izin penghutang adalah keperluan undang-undang di bawah s 4(3) Akta Undang-Undang Sivil 1956 untuk penyerahhakkan mutlak menjadi sah dari segi undang-undang.

Pada pendengaran rayuan ini, Merita berhujah bahawa memandangkan s 4(3) tidak memerlukan izin penghutang untuk membuat penyerahhakkan sah, klausa-klausa bukan penyerahhakkan dalam kontrak 1996 dan 1997 bertentangan s 4(3). DBP berhujah bahawa asalkan Benatulin tidak mendapatkan izinnya untuk membuat penyerahhakkan di bawah kontrak ia tidak mempunyai tanggungjawab untuk menghormati apa-apa penyerahhakkan sedemikian dan penyerahhakkan tidak boleh dikuatkuasa terhadap DBP.

Diputuskan, menolak rayuan:

(1) Walaupun izin penghutang bukan prasyarat di bawah s 4(3) Akta Undang-Undang Sivil 1956 ('AUS'), isu penting di sini adalah sama ada satu pihak kepada kontrak boleh secara literal menyerahhakkan hak dan faedahnya di bawah kontrak meskipun bersetuju untuk diikat oleh klausa bukan penyerahhakkan yang mana jelas menetapkan bahawa izin adalah prasyarat sebelum penyerahhakkan sah boleh dikuatkuasakan. Ini membawa isu ke dalam fokus, iaitu sama ada izin di bawah klausa bukan penyerahhakkan adalah prasyarat sebelum penyerahhakkan boleh menjadi sah walaupun terdapat fakta bahawa ini tidak jelas disebut di bawah s 4(3) AUS; atau, sama ada klausa bukan penyerahhakkan dan keperluan untuk izin adalah sah dari segi undang-undang (lihat perenggan 21–22).

(2) Atas fakta kes, mahkamah tidak boleh menyetujui hujahan Merita bahawa memandangkan notis betul penyerahakkan bertulis diberikan kepada DBP, keperluan untuk penyerahhakkan yang sah dan mengikat untuk dikuatkuasakan di bawah s 4(3) AUS adalah dipenuhi. Di bawah kontrak 1996 dan 1997, izin adalah prasyarat sebelum penyerahakkan sah boleh dibuat. Keperluan di bawah s 4(3) AUS berkaitan kepada penyerahakkan sah hanya berkuatkuasa jika kontrak boleh diserhakkan atau sekatan untuk menyerahhakkan dipenuhi. Dalam kes ini, klausa non-assignment dan unsur izin yang membentuk terma kontrak yang penting bahawa pihak-pihak perlu bersetuju. Ini membentuk prasyarat utama sebelum prasyarat lain di bawah s 4(3) AUS boleh dipertimbangkan (lihat perenggan 32).

(3) Poin penting yang kritis adalah sama ada notis penyerahhakkan tersebut diberi kepada DBP tetapi sama ada Benatulin telah mendapatkan izin DBP sebelum melaksanakan penyerahhakkan dengan Merita. Memandangkan Benatulin gagal untuk mendapatkan izin DBP, DBP tidak terikat untuk menghormati permintaan Merita dan betul apabila enggan untuk menerima arahan Benatulin untuk membuat bayaran kepada Merita. Penyerahhakkan yang dikatakan tersebut, P2, yang tidak mempunyai izin DBP kepadanya, tidak mengikat DBP dan tidak boleh dikuatkuasa terhadapnya. P2, tanpa izin DBP kepadanya, adalah jelas

A melanggar klausa 23 kontrak 1997 tersebut. Tuntutan Merita sebagai penerima serah hak oleh itu gagal. Selanjutnya, tuntutan Merita terhadap DBP tidak boleh dibenarkan kerana DBP telah membuat bayaran untuk kontrak 1997 kepada kedua-dua CFP dan Benatulin. Oleh itu, adalah tidak adil untuk Merita untuk memulakan prosiding terhadap DBP
B untuk bayaran yang telah dibuat (lihat perenggan 43–44).]

Notes

For cases on assignment of sum due, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3626–3630.
C

Cases referred to

Hendry v Chartsearch Ltd [1998] CLC 1382, CA (refd)
Lam Hong Hardware Co Sdn Bhd v Incacon Sdn Bhd & Ors (Eon Bank Bhd, intervener) [2006] 4 MLJ 531, CA (refd)
D *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and others and another appeal* [1993] 3 All ER 417, HL (refd)

Legislation referred to

E Civil Law Act 1956 s 4(3)

Appeal from: Civil Appeal No W-02–1324 of 2010 (Court of Appeal, Putrajaya)

F *Ong Chee Kwan (Christopher & Lee Ong) for the appellant.*
J Doshi (Abdullah & Zainudin) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

G INTRODUCTION

[1] This is an appeal against the judgment of the Court of Appeal dated 28 March 2013 which allowed the second defendant's appeal against the decision of the High Court with costs. At the High Court the plaintiff, Merita
H Merchant Bank Singapore Ltd ('Merita') sued the second defendant, Dewan Bahasa dan Pustaka ('DBP') as an assignee of certain debts due and payable by DBP to the first defendant, Benatulin Timur Sdn Bhd ('Benatulin') who had supplied printing papers to DBP.

I **[2]** On 6 April 2010, the learned High Court judge after a full trial allowed Merita's claim against DBP and entered judgment in the sum of RM6,206,547.62 and RM584,000 with interest and costs. Earlier, Merita had, on 14 August 2008 obtained a judgment in default against Benatulin for the sum of RM2,235,768.58.

[3] On 21 November 2013, this court granted Merita leave to appeal on a sole question of law which reads as follows: A

> In the assignment under Section 4(3) of the Civil Law Act 1956, whether consent of the Debtor is a legal requirement in order for the assignment to be valid in law.

BACKGROUND FACTS B

[4] In 1996–1997, DBP awarded three contracts to Benatulin for the supply of paper and cardboard to DBP, namely:

(a) contract for tender 3/96 (D21) and contract for tender 7/96 (D22) up to 31 December 1996 ('1996 contracts'); and C

(b) contract from 3 September 1997 (D28) ('1997 contract').

[5] In order to honour its supply obligations to DBP, Benatulin sought a financing facility from Merita, and as security, Benatulin assigned all payments due to it by DBP to Merita. D

[6] The contracts between DBP and Benatulin expressly provided under cl 24 in the 1996 contracts and cl 23 in the 1997 contract that no assignment could be made without the prior written consent of DBP. Clauses 24 and 23 which were similarly worded expressly provides as follows: E

> 24 SUBKONTRAK, SERAH HAK DAN LAIN-LAIN
>
> 24.1 Kontraktor tidak boleh mensubkontrakkan Perjanjian ini atau mana-mana bahagiannya dengan tidak terlebih dahulu mendapat persetujuan bertulis DEWAN DENGAN SYARAT BAHAWA kelulusan sedemikian itu jika diberikan oleh Dewan hendaklah tidak menyentuh atau meluputkan kewajipan dan tanggungan Kontraktor kepada Dewan dibawah Perjanjian ini dan DENGAN SYARAT SELANJUTNYA Kontraktor hendaklah bertanggungjawab terhadap apa-apa kesalahan, kegagalan, kemungkiran, kecuaian dan kelalaian pihak yang kepadanya subkontrak diberikan. F G
>
> 24.2 Kontraktor tidak boleh memindah milik Perjanjian ini atau mana-mana bahagiannya, menyerahhak, menggadai janji, menggadai atau apa-apa juga wang yang kena dibayar kepada Kontraktor di bawah Perjanjian ini dan apa-apa faedah yang terbit darinya dengan tidak terlebih dahulu mendapat kelulusan bertulis Dewan DENGAN SYARAT BAHAWA kelulusan sedemikian itu jika diberikan oleh Dewan hendaklah tidak menyentuh atau meluputkan kewajipan dan tanggungan Kontraktor kepada Dewan dibawah Perjanjian ini. H

I

[7] In the context of the above contracts the words 'Dewan' referred to DBP and 'Kontraktor' referred to Benatulin. From the above clause, it could be surmised that:

A (a) there could be no assignment of rights by Benatulin under the contract without the prior written consent of DBP. The prior written consent was a pre-condition to any assignment of the benefits under the contract; and

B (b) in the event the written consent was given, such consent could not affect the responsibilities and liabilities of the contractor, ie, Benatulin, pursuant to the contract.

[8] Under the 1996 contracts, Benatulin had obtained a written consent C from DBP (exhs P3 and D24 for tender 3/96 and exh P4 for tender 7/96) for the payment due to it to be assigned to Merita. Pursuant to the consent obtained, all monies due under the 1996 contracts were paid by DBP to Merita.

D **[9]** All was well between the parties until 1998, when Merita filed a civil suit against Benatulin and DBP to claim for payments for purchases made after the 1996 contracts.

[10] It is not in dispute that after the expiry of the 1996 contracts DBP E issued purchase orders to Benatulin vide the following letters:

(a) letter dated 2 June 1997 (P7);

(b) letter dated 11 July 1997 (P8); and

F (c) letter dated 7 August 1997 (P9) ('the said letters').

[11] It is Merita's case that pursuant to the said letters, papers were supplied by Benatulin to DBP and invoices were issued thereunder with express endorsement for the cheques to be made payable to Merita. However despite G the endorsements in the said invoices DBP had failed to make any payment to Merita. It is Merita's case that the aforesaid purchases vide the said letters were an extension to tender 3/96 of the 1996 contracts. Merita took the position that at all times, DBP treated the purchases post the 1996 contracts as nothing more than continuing purchases under the 1996 contracts. In these H circumstances, Merita claimed that DBP was obliged to make all payments due for the orders made under the said letters to Merita.

[12] In supporting its claim Merita relied on DBP's letter dated 2 June 1997 (P7) wherein DBP confirmed that Benatulin's re-appointment as a supplier for I the year 1997 was an extension of tender 3/96 of the 1996 contract. Further Merita relied on the undated assignment (P2) stamped on 22 April 1998 which was executed between Benatulin and Merita wherein all of Benatulin's rights under the contracts executed between DBP and Benatulin were to be assigned to Merita. Thus, it was contended that the assignment (P2) was an absolute

assignment wherein it expressly stated that Benatulin agreed to and has irrevocably and unconditionally assigned, transferred and set-over to Merita all its rights, title and interest of all contracts entered between DBP and Benatulin. A

[13] In its defence DBP maintained that the purchases made vide the said letters after the 1996 contracts were made pursuant to the 1997 contract. As we have said earlier, in the 1997 contract which was executed between DBP and Benatulin on 3 September 1997, there was a similar restriction for subcontract and assignment as was provided under cl 24 of the 1996 contracts. The said restriction was laid down under cl 23 of the 1997 contract wherein it was a precondition that Benatulin must get the written consent from DBP before any assignment of Benatulin's rights and benefits under the contract could be made. B C

[14] It is DBP's case that for the 1997 contract, Benatulin had applied for and obtained the consent in writing of DBP for payments due to be paid to one Consolidated Forest Products Sdn Bhd ('CFP'). The written consent of DBP was given by a letter dated 10 October 1997 (P41). In accordance with the consent given, DBP was to pay the monies to CFP until notified otherwise. It is DBP's case that payments were made to CFP under the 1997 contract. D E

[15] In respect of the assignment executed by Benatulin, it is DBP's case that it never consented to it. Thus, it is DBP's case that the payments for the 1997 contract was made to CFP for which Benatulin had applied for and obtained DBP's consent. It would therefore be wrong and unjust for DBP to pay again for the same purchases. F

AT THE HIGH COURT

[16] The learned trial judge after a full trial allowed Merita's claim against DBP. The learned trial judge held that the supply made by Benatulin based on the said letters was an extension of the 1996 contracts under tender 3/96. The learned trial judge also held that the assignment at exh P2 was an absolute assignment; and, was not limited to any particular contract. It covered all supplies under the said letter which was binding on Merita, Benatulin and DBP. G H

AT THE COURT OF APPEAL

[17] The Court of Appeal allowed DBP's appeal and set aside the learned trial judge's orders. Essentially the Court of Appeal held that the learned trial judge erred when she overlooked the undisputed fact that the assignment itself did not bear the assent of DBP. DBP was not a party to it. The Court of Appeal found that although tender 3/96 was mentioned in the said letters which I

A Merita had predicated its claim, it did not necessarily make DBP a party to the assignment in P2 between Benatulin and Merita. The fact that the purported assignment was not dated and was only stamped about a month after the writ was filed supports the conclusion that no copy of the undated assignment was served on DBP and was kept by Merita. As for the two notices of the B assignment given by Merita to DBP, the Court of Appeal held that the notices in their plain and literal meaning only gave notice of the payments due under the respective contracts. The language used in the notices did not reflect the express language used in the undated assignment, ie, that it was an assignment of payment for all the respective contracts.

C

AT THE FEDERAL COURT

[18] Before us learned counsel for Merita submitted that s 4(3) of the Civil Law Act 1956 ('the CLA') provided that a legal assignment is valid once the D assignment is made in writing and notice of the same had been given to the debtor. As such learned counsel highlighted that there is no necessity for the assignor to obtain the consent of the debtor before a legal assignment can be made. Based on the facts, learned counsel argued that a proper notice of assignment in writing had been given by Merita to DBP and that fulfilled the E requirement for a valid and binding assignment to take effect under s 4(3) of the CLA. Learned counsel further submitted that since consent is not a prerequisite for an assignment to be valid and binding on the parties, the non-assignment clauses which appeared in the 1996 contracts and the 1997 contract as in this case was in effect a contravention of s 4(3) of the CLA.

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[19] DBP took the position that the element of consent is a prerequisite before any legal assignment of the benefits under the 1996 contracts and 1997 contract, could be assigned. This was clearly stipulated under the non-assignment clauses as appears in cl 24 of the 1996 contracts and cl 23 of G the 1997 contract that Benatulin could not assign any part of the contract, any monies under the contract and any of the benefits under the contract without the consent of DBP. Since Benatulin failed to obtain consent for the assignment of the benefits for the purchases made under the said letters ie, the 1997 contract which Merita had based its claim on, any purported assignment H as between Benatulin and Merita was unenforceable against DBP.

FINDINGS

[20] Thus, the issue for us to determine is whether consent of the debtor is a I legal requirement in order for an assignment to be valid in law under s 4(3) of the CLA. In this case, it is not in dispute that there was a restriction imposed against Benatulin to subcontract or assign their rights under the two contracts, ie, the 1996 contracts and 1997 contract vide cll 24 and 23 for which both DBP and Benatulin agreed to be bound. The restriction on the assignment of

the contractual rights and benefits in both the contracts spelt out in no uncertain terms that Benatulin could not assign or transfer any part of the contract, any monies and benefits under the contract without the prior written consent of DBP. A

[21] We agree with the submission of Merita on this point in that consent of the debtor is not a precondition under s 4(3) of the CLA. Section 4(3) of the CLA provides that: B

> Any absolute assignment, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. C D

[22] The pivotal issue here is however whether one party to a contract can unilaterally proceed to assign the rights and benefits under the contract despite having agreed to be bound mutually by a non-assignment clause which clearly stipulated that consent was a precondition before a valid assignment could be effected? This brings into focus another issue ie, whether consent under a non-assignment clause is a precondition before an assignment can be valid notwithstanding the fact that this is not clearly spelt out under s 4(3) of the CLA. Against the backdrop of these issues, we are to determine whether the non-assignment clauses and the requirement for consent as incorporated in the 1996 contracts and the 1997 contract in the present case are valid in law. E F

[23] Perhaps it would be opportune for us first to deal on the concept of non-assignment clauses and what it entails as a legal mechanism of some consequence. In practice, non-assignment clauses are very common in modern commercial contracts, often drafted for the benefit of both parties. Prohibitions on assignment derive from a concern that the debtor should not be required to perform the contract for anyone other than the party to the contract. This is their commercial objective. Further the non-assignment clause is subject to terms as agreed between the parties. As such that term must be binding on both of the parties. The effect of the prohibition depends on the construction of the prohibition clause in the contract. The prohibition may not be absolute, for example, a term that one party is not to assign the contract without the consent of the other. 'If a contract contains a term prohibiting assignment, any purported assignment in breach of that prohibition made by one party of his contractual rights or of his rights arising under the contract will be ineffective as against the other party to the contract. It may however create G H I

A rights between the assignor and assignee.' (see *Law of Assignment* by AG Guest (1st Ed, 2012)).

B **[24]** The English courts seemed to support the above proposition in that an assignment which was made in contravention of the non-assignment clause was unenforceable against the debtor. The leading case on this point is *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and others and another appeal* [1993] 3 All ER 417 where the House of Lords held that a contractual prohibition vide cl 17 on the non-assignment of the benefit of a contract is not C contrary to public policy. The House of Lords held that prohibitions of such nature are, therefore, enforceable. His Lordship Lord Browne-Wilkinson had this to say:

> In my judgment clause 17 clearly prohibits the assignment of any benefit of or under the contract. It therefore follows the purported assignment to Linden Garden D without the consent of the contractor constituted a breach of clause 17. The claim of Linden Gardens as assignee must therefore fail unless it can show that the prohibition in clause 17 was either void or contrary to public policy or, notwithstanding the breach of clause 17, the assignment was effective to assign the chose in action to Linden Garden.

E

[25] In *Hendry v Chartsearch Ltd* [1998] CLC 1382 the English Court of Appeal reiterated its earlier stance in *Linden Gardens* when it held that where an assignment of contractual rights was prohibited without the prior written consent of the other party, there could be no valid assignment where the F consent was not sought before the assignment was made.

[26] Text book authors have also lent credence to this proposition in their books. RM Goode in his book *Legal Problems of Credit and Security* (2nd Ed, 1988) at p 123 had this to say:

G

> ... It is equally clear that a contractual provision against assignment entitles the debtor to refuse to deal with the assignee and to continue making payment to the assignor, so that the assignment is not capable of taking effect as a statutory assignment. Further a purported assignment by the original creditor would place H him in breach of contract and entitle the debtor to exercise any remedies for breach of contract given by the agreement and the law. In short, the prohibition is effective as between the debtor and the assignee, and if the assignee brings proceedings his claim will be dismissed.

I **[27]** *Chitty on Contracts* (26th Ed) Vol 1 at para 1413 also expressed a similar view in that:

> If rights arising under a contract are declared by the contract to be incapable of assignment, it seems that any purported assignment will be invalid against the debtor.

[28] AG Guest in his book *The Law of Assignment* (1st Ed, 2012) stated that:

> If a contract contains a term prohibiting assignment, any purported assignment in breach of that prohibition made by one party of his contractual rights or of his rights arising under the contract will be ineffective as against the other party.

[29] The learned author further added that:

> The question whether and to what words of prohibition have the effect of prohibiting assignment is to be determined by construing the terms of the prohibition.

[30] Closer to home the Court of Appeal in the case of *Lam Hong Hardware Co Sdn Bhd v Incacon Sdn Bhd & Ors (Eon Bank Bhd, intervener)* [2006] 4 MLJ 531 in its majority decision took a similar stance when it held that:

> Di dalam rayuan ini sekarang, fasal 17 *articles of documents* jelas melarang responden pertama menyerahhak apa-apa bayaran kepada pihak ketiga tanpa kebenaran bertulis daripada responden ketiga. Dengan itu, suratikatan serahhak di antara responden pertama dengan pencelah tanpa kebenaran bertulis adalah tidak sah. Dengan itu, responden ketiga tidak tertambat dengan suratikatan serahhak tersebut. Ini dikuatkan oleh peruntukan fasal 3.09 *articles of documents*.

[31] We share the same view. On the facts of this case, we find that the non-assignment clauses appearing in both the 1996 contracts and the 1997 contract were valid and binding on both parties. The two clauses appearing in both contracts prohibiting assignment were not absolute in nature but qualified in the sense once written consent is obtained one party can still assign their rights and benefits under the contract. The non-assignment clauses here expressly laid down that consent was a condition precedent before an assignment can be made. In our judgment, we find that the insertion of the non-assignment clauses as a term of the contract is not in contravention of s 4(3) of the CLA. The non-assignment clause which made consent a precondition before the debts could be assigned did not operate to invalidate the assignment contract as it was a term agreed upon by both parties when they entered into the contract. It is trite that parties are free to enter into a contract with terms and conditions as they deem fit and these terms and condition are binding on the parties who have in the first place agreed to be bound by it. Thus, we hold that there could be no valid assignment if the element of consent under the non-assignment clause is not fulfilled. It was a well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreement must adhere to their terms.

[32] In our judgment, on the facts of this case, we are unable to accede to the arguments urged upon us by learned counsel for Merita that since a proper notice of assignment in writing had been given by Merita to DBP, it fulfilled the requirement for a valid and binding assignment to take effect under s 4(3) of

A the CLA. As we have said earlier the element of consent is a prerequisite before a valid assignment can be made. Thus, the requirements under s 4(3) of the CLA 1956 with regard to a legal assignment only comes into play if the contract is assignable or the restriction to assign is fulfilled. In the instant case the non-assignment clauses and the element of consent thereunder formed an B important term of the contract that parties have agreed. That formed the main prerequisite before the other prerequisites under s 4(3) of the CLA could be considered.

C **[33]** The next issue which begs our consideration is whether DBP's consent was indeed obtained by Benatulin prior to the assignment of their rights and benefits of Benatulin's contract with DBP to Merita. For this purpose, we must examine the conduct of the parties and the events that led to this dispute. From the contemporaneous documents referred to by learned counsel for DBP and D Merita, we observe the following:

(a) for the 1997 contract, DBP had vide letter dated 30 April 1997 appointed Benatulin as the supplier with a condition that expressly provides as follows:

E > Adalah dimaklumkan bahawa perlantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung di dalam perjanjian yang akan ditandatangani di antara Dewan Bahasa dan Pustaka dengan pihak tuan kelak.

F (b) Benatulin accepted the appointment and the 1997 contract was duly executed on 3 September 1997. The 1997 contract came into effect from 3 August 1997. The non-assignment clause was stipulated under cl 23;

(c) for the 1997 contract, Benatulin had applied for and obtained the G consent in writing from DBP in accordance with cl 23 of the 1997 contract for all monies to be paid to one party known as Consolidated Forest Products ('CFP'). DBP's consent letter dated 10 October 1997 is exhibited as P41;

H (d) Benatulin reaffirmed their position vide letter dated 27 October 1997 (D44) to DBP stating that all payments were to be made to CFP. Particulars of the invoices were attached together with the said letter;

(e) DBP replied vide letter dated 7 November 1997 affirming the invoices to be paid to CFP; and I

(f) CFP had thereafter issued a letter dated 26 February 1998 for DBP to release all monies due under the 1997 contract to Benatulin. DBP accordingly released the said monies to Benatulin.

[34] It is surprising to note that notwithstanding the arrangement between DBP and Benatulin for the assignment of their rights under the 1997 contract to CFP, Benatulin had vide letter dated 25 February 1998 written to DBP revoking its instruction in the earlier letters ie, payments to be made to CFP and directed DBP to make all payments to Merita. What prompted them to do this?

[35] The problem lies with regard to the purchases made by DBP vide the said letters issued at different dates before the formal execution of the 1997 contract. The dispute here was this: Merita had placed reliance on the said letters to say that DBP's purchases were an extension of the 1996 contract vide tender 3/96. Pursuant thereto Merita took the position that based on the assignment in P2, that was executed between them and Benatulin all payments due for the purchases made under the said letters must be made to them and not CFP.

[36] The letters relied upon by Merita can be deduced hereunder: bullet 36.1 letter dated 2 June 1997 (P7) from DBP to Benatulin; bullet 36.2 letter dated 11 July 1997 (P8) from DBP to Benatulin; and bullet 36.3 letter dated 7 August 1997 (P9) from DBP to Benatulin.

[37] Learned counsel for Merita highlighted that the said letter dated 2 June 1997 from DBP to Benatulin (P7) contained a notification stating that 'perlantikan semula syarikat tuan adalah sebagai lanjutan kepada kontrak pembekalan Tender 3/96'. Hence, it was for this reason Merita took the position that the purchases made thereunder was subject to the 1996 contract and not the 1997 contract. Merita also submitted that since the aforesaid letter clearly stated that Benatulin's appointment was as an extension to tender 3/96, DBP was at all times aware that the purchases were made under the 1996 contract.

[38] In our judgment we find Merita's reliance on P7, P8 and P9 to be misconceived. Whilst we do accept that P7, P8 and P9 made mention of tender 3/96, however we find that this did not necessarily mean that DBP consented to the assignment of Benatulin's rights to Merita. The language used in the said letters did not support the submissions made by learned counsel for Merita that DBP had acknowledged that the purchases made were an extension to the 1996 contract vide tender 3/96. The caption 'lanjutan kepada Tender 3/96' referred to details as to the purchases/orders. It did not relate to the terms of the contract between DBP and Benatulin. We are of the view that P7, P8 and P9 must be viewed in accordance with DBP's letter of appointment dated 30 April 1997 of Benatulin wherein it was clearly stipulated that 'perlantikan syarikat tuan ini tertakluk kepada syarat-syarat sepertimana yang terkandung dalam *perianjian yang akan ditandatangani antara DBP dan tuan*'. (Emphasis added.)

A **[39]** The above phrase in italics which we have emphasised in our view to be crucial. It is conceivable that the contract referred to which was to be signed at a later date must be the 1997 contract. Thus, the reference of tender 3/96 in P7, P8 and P9 would have meant the assurance of continuity in Benatulin's appointment and similar pattern of purchases as in tender 3/96 subject to the terms of the contract which was to be executed ie, the 1997 contract. We are fortified in coming to this conclusion based on the evidence of DW1 who had clearly and categorically stated that the supply for the 1997 contract did not form part of tender 3/96, as no tender was called for the 1997 supply, hence he had in the said letters, referred to the earlier tender ie, tender 3/96, so that Benatulin would be familiar with the terms of the new supply.

[40] In so far as the purported assignment in P2 which formed the basis of Merita's claim, Merita took the position that DBP was put to notice of the said assignment between Benatulin and Merita vide the notice of assignment served on DBP on 27 February 1998. In fact, Merita submitted that notice of assignment had been given by Merita to DBP as early as 23 August 1996 in their letter to DBP of Benatulin's assignment of rights. Merita also placed reliance on the invoices to substantiate their contention.

[41] We have subjected these documents to scrutiny. With respect we are unable to agree with Merita's contentions. Since it is our finding that the element of consent is an important prerequisite, the fact that there existed an assignment between Merita and Benatulin did not strengthen Merita's case as the contract stipulated that consent by the debtor (DBP) was a prerequisite before a valid assignment could be made. Nowhere did Merita highlight to us that this has been adhered to. At the risk of repeating ourselves, we reiterate here that it is an implied term of the contract that there could be no assignment by Benatulin of its rights under the 1997 contract unless the prior written consent of DBP was obtained. An attempted assignment of contractual rights in breach of a contractual prohibition was ineffective to vest the contractual rights in Merita.

[42] Further, it is significant to note that the purported assignment P2 which formed the basis of Merita's claim was dated and stamped on 22 April 1998 although notice of such an assignment was given to DBP as early as 23 August 1996. On this issue the Court of Appeal found that since the assignment at P2 was dated and stamped at a much later date supported the conclusion that the purported assignment in P2 was not served on DBP.

[43] In our judgment, the point of critical importance was not whether notice of assignment was given to DBP but whether Benatulin had obtained DBP's consent before executing the assignment with Merita. As we have alluded to earlier since Benatulin had failed to secure DBP's consent, hence

DBP was, therefore, not bound to honour Merita's request and had rightfully refused to recognise the instruction by Benatulin to make payment to Merita. The purported assignment which lacked the consent of DBP for the purchases made under the said letters were unenforceable against DBP. It follows that the purported assignment by Benatulin to Merita without the consent of DBP constituted a breach of cl 23 of the 1997 contract. Merita's claim as an assignee must, therefore, fail. Further, this court cannot allow Merita's claim against DBP as the payment due under the purchases made pursuant to the said letters had already been paid by DBP to Benatulin and CFP.

[44] To sum up, the irresistible conclusion that can be drawn based on facts and circumstances is that P2 was executed by Benatulin and Merita in clear breach of cl 23 of the 1997 contract wherein it was clearly stipulated in no uncertain terms that Benatulin must obtain the consent in writing from DBP before they could assign all of their rights under the contract. Since no consent in writing was obtained from DBP by Benatulin for it to assign its rights under the 1997 contract, DBP was not bound by the assignment in P2 to make any payment to Merita. Applying the principles of law discussed in the preceding paragraphs we hold that the purported assignment in P2 was not binding on DBP. Based on the facts before us we find that the existence of such consent by DBP was wanting. On the other hand, the undisputed facts clearly supported DBP's defence in that based on the consent given to Benatulin for the assignment of the contractual rights under the 1997 contract monies were duly paid to Benatulin in the sum of RM2,235,768.58 and to CFP in the sum of RM6,258,787.86. Thus, was unjust for Merita to initiate proceedings against DBP for payments that have already been made.

[45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrust the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment, we find that there was insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree. We agree with the Court of Appeal in finding that the learned trial judge erred in finding that the supply made by Benatulin based on the said letters were an extension of the 1996 contracts. We find that the purchases made by DBP vide the said letters were within the ambit of the 1997 contract. The trial judge erred in facts and law when she held that the purchases made by DBP vide the said letters was a continuation under the 1996 contracts pursuant to tender 3/96. The fact of the matter is that the judgment sum as adjudged by the trial judge were monies under the 1997 contract for which DBP had duly made payments to Benatulin and CFP. The

learned trial also erred when she concluded that P2 was an absolute assignment and was not confined to any particular contract. The error of the learned trial judge became more pronounced when she held that the assignment in P2 was binding upon Benatulin, Merita and DBP when in actual fact DBP never consented nor were they privy to the assignment in P2.

[46] Under the circumstances, we hereby answer the question of law posed in this appeal in the negative. Based on the facts and circumstances of the case, we hold that consent was a prerequisite before a valid and lawful assignment could be made as under the non-assignment clauses, consent formed an important term of the contract which was binding on both the parties. For the above-stated reasons, this appeal is dismissed with costs.

Appeal dismissed.

Reported by Ashok Kumar